

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,)

Plaintiff,)

vs)

LUIS ANGEL GONZALEZ-LARGO,)

Defendant,.)

2:07-cr-0014 JCM (RJJ)

ORDER

Presently before the court is petitioner Luis Angel Gonzalez Largo's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Doc. #357. The government has filed a response (doc. #370), petitioner has failed to file a reply.

Petitioner raises four claims for relief. He alleges that his counsel rendered ineffective assistance by (1) not pursuing a plea agreement and (2) failing to object to his presentence investigation report and the court's jury instructions regarding conspiracy. Petitioner further contends that his conviction should be vacated because (3) he was unlawfully arrested and extradited from Nicaragua and (4) his double jeopardy rights were violated. The court finds that the claims lack merit and denies the motion for the reasons that follow. Additionally, the court denies the request for an evidentiary hearing because record before the court "conclusively shows" that petitioner is not entitled to relief. 28 U.S.C. § 2255(b); *Farrow v. United States*, 580 F.2d 1339, 1360-61 (9th Cir. 1978) (en banc).

Discussion

Ineffective Assistance of Counsel

Ineffective assistance of counsel requires that the petitioner show that his counsel's performance fell below an objective standard of reasonableness and a "reasonable probability" that the performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). "A

1 court must indulge a strong presumption that counsel's conduct falls within a wide range of
2 reasonable professional assistance; that is, the defendant must overcome the presumption that, under
3 the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. To
4 establish that the performance was prejudicial, the petitioner must show that there is a "reasonable
5 probability that, but for counsel's unprofessional errors, the result of the proceeding would have been
6 different." *Id.* at 694.

7 The court need not conduct an evidentiary hearing where "the motions and the files and
8 records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).
9 The court may take notice of affidavits filed in support of the habeas petition and response when
10 addressing issues raised by a petitioner. *See United States v. Hernandez-Mendoza*, No. 98-35849,
11 1999 WL 1217933 at *5 (9th Cir. 1999) (unpublished) (upholding the denial of an evidentiary hearing
12 on a § 2255 petition where "[t]he district court reviewed the plea agreement, the plea petition, the
13 transcript of the change of plea proceedings, and the affidavits of [defense counsel] before denying
14 the motion for an evidentiary hearing."). An evidentiary hearing is only needed if "accepting the truth
15 of [defendant's] factual allegations, he could have prevailed on an ineffective assistance claim."
16 *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994).

17 Petitioner contends he was denied effective assistance of counsel because his attorney "advised
18 trial was best [the] best option."¹ Doc. #357, pg. 5. The record before this court, however, strongly
19 refutes petitioner's allegations. Petitioner's counsel, Gabriel Grasso, provided an affidavit that states
20 it was petitioner who was reluctant to accept a plea agreement and chose to proceed to trial. Opp.,
21 Ex. 1.

22 Moreover, even if this court accepts petitioner's allegations, and assumes that it was Mr.
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25 Petitioner also contends that defense counsel should have attempted to obtain a "fast-track"
26 disposition through plea negotiations. The court finds no merit to this contention because
27 "fast-track" dispositions are not a right and the decision to implement any "fast-track"
28 consideration lies solely within the prosecutor's discretion. *United States v. Reyes-
Hernandez*, 624 F.3d 405, 421-22 (7th Cir. 2010). The "fast-track" program does not create
any prospective substantive or procedural rights for defendants. *See, e.g.*, Deputy Attorney
General James M. Cole, Department Policy on Early Disposition or "Fast-Track" Programs,
dated January 31, 2012.

1 Grasso who favored a trial over a plea deal, such counseling does not necessarily amount to
2 ineffective assistance of counsel. In *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Supreme Court
3 explained that advice to proceed to trial must be predicated on an “erroneous interpretation of the law”
4 or a “gross mischaracterization of the likely outcome,” to constitute ineffective assistance of counsel.
5 *Id.* at 1390-91; *see also United States v. Keller*, 902 F.2d 1391, 1394 (9th Cir. 1990) (“erroneous
6 predictions regarding a sentence are deficient only if they constitute gross mischaracterization of the
7 likely outcome of a plea bargain combined with . . . erroneous advice on the probable effects of going
8 to trial.”) (internal quotations removed).

9 Here, petitioner has failed to allege specific facts regarding any deficient legal advice or
10 mischaracterization of the likely outcome. Petitioner has provided only conclusory allegations devoid
11 of factual support. Therefore, the ineffective assistance claim regarding counsel’s alleged advice to
12 proceed to trial must be dismissed. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (“conclusory
13 allegations unsupported by specifics is subject to summary dismissal.”); *see also Farrow v. United*
14 *States*, 580 F.2d 1339, 1360-61 (9th Cir. 1978) (en banc) (requiring petitioners to allege specific facts
15 supporting a claim for ineffective assistance of counsel).

16 Petitioner’s remaining allegation of ineffective assistance of counsel, that Mr. Grasso failed
17 to object to the presentence investigation report or to the jury instructions contradicts the court’s
18 records. Objections were made to the presentence investigation report both in writing, *see Opp.*, Ex.
19 2, and during this court’s sentencing hearing. Additionally, prior to the sentencing hearing, Mr.
20 Grasso filed a sentencing memorandum outlining for the court the objections he filed with the
21 probation department. *See doc. #242*. The claim premised on a failure to object to the report is
22 therefore without merit.

23 Further, the Ninth Circuit has already reviewed petitioner’s claims regarding the objections
24 to the jury instruction and found that (1) the instruction was not erroneous; and (2) even if it was, it
25 did not affect petitioner’s substantial rights. As this issue has been decided adversely to petitioner on
26 direct appeal, he cannot litigate the issue in his § 2255 petition. *See Odom v. United States*, 455
27 F.2d 159, 160 (9th Cir. 1972).

1 Unlawful Arrest

2 A petitioner is precluded from arguing claims in a § 2255 motion that he failed to raise a
3 trial or on appeal, unless the petitioner can “demonstrate both cause excusing his procedural default,
4 and actual prejudice resulting from the claim of error.” *United States v. Johnson*, 988 F.2d 941, 945
5 (9th Cir. 1993) (citing *United States v. Frady*, 456 U.S. 152 168 (1982)). Attorney
6 oversight short of ineffective assistance of counsel does not constitute cause to excuse the procedural
7 default of a claim. *Murray v. Carrier*, 477 U.S. 478, 491-92 (1986), superseded by statute on other
8 grounds, Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, Apr. 24, 1996, 110 Stat.
9 1214. Further, “a failure to raise untenable issues on appeal does not fall below the *Strickland*
10 standard.” *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002).

11 The court does not find that petitioner’s failure to address the possible issue of unlawful arrest
12 rises to the level of ineffective assistance of counsel. *See Turner*, 281 F.3d at 872; *Gustave v. United*
13 *States*, 627 F.2d 901, 906 (9th Cir. 1980) (“the decision . . . [is] a strategic decision of the attorney
14 and his failure to do so, even against his client’s wishes, is not ineffective representation.”).

15 As petitioner cannot show ineffective assistance of counsel, he must show “some external
16 impediment preventing counsel from constructing or raising the claim” to establish sufficient cause
17 to excuse the procedurally defaulted § 2255 claim. *Carrier*, 477 U.S. at 492. Petitioner has failed
18 to show any such impediment.

19 Double Jeopardy²

20 Petitioner’s double jeopardy claims are procedurally barred for the same reasons as his
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23 Out of an abundance of caution, the government has interpreted petitioner’s fourth claim as
24 also raising a speedy trial claim. While it is not clear if petitioner is indeed seeking to raise
25 a speedy trial claim, the court has conducted an analysis pursuant to *Barker v. Wingo*, 407
26 U.S. 514 (1972), and concludes that petitioner’s Sixth Amendment rights have not been
27 violated. Here, the reason for the delay between indictment and trial was a result of motions
28 filed by the defense and a number of stipulations to allow the defense to prepare the case.
Id. at 531. Further, unlike his co-defendant, the petitioner here never filed a motion with the
court asserting his speedy trial right. *Id.* at 531-32. Lastly, and most importantly, there was
no prejudice because petitioner ultimately did not present any witnesses or evidence in his
defense, and thus the delay could not have hindered “his ability to . . . prepare his defense,”
as no defense was presented. *Id.* at 533.

1 unlawful arrest claims. The double jeopardy claim is without merit and therefore counsel's failure
2 does not amount to a *Strickland* violation. *See Turner*, 281 F.3d at 872.

3 Accordingly,

4 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that petitioner Luis Angel
5 Gonzalez Largo's motion pursuant to 28 U.S.C. § 2255 (doc. #357) be, and the same hereby is,
6 DENIED.

7 DATED August 7, 2012.

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UNITED STATES DISTRICT JUDGE